LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
NOV 17 1952

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1952.

No. 37.

LLOYD A. FRY ROOFING COMPANY,
Petitioner,

vs.

SCOTT WOOD et al., Individually and as Members of and Composing the ARKANSAS PUBLIC SERVICE COMMISSION,
Respondents.

REBUTTAL BRIEF

Filed on Behalf of Petitioner.

JAMES W. WRAPE,
GLENN M. ELLIOTT,
1904 Sterick Building,
Memphis, Tennessee,
Attorneys for Petitioner.

TABLE OF AUTHORITIES CITED.

Page

Cases Cited.

Bradley v. Public Utilities Commission, 289 U. S. 92, 77 L. Ed. 1053 10

Columbia Terminals Company v. Lambert et al., 309 U. S. 620, 84 L. Ed. 983 9

Frank Eicholz v. Public Service Commission of the State of Missouri, 306 U. S. 268, 83 L. Ed. 641 9

Georgia Truck System, Inc., v. Interstate Commerce Commission, 122 F. (2d) 210 8

Interstate Commerce Commission v. F. & F. Truck Leasing Company, 78 F. Supp. 13 ..... 5, 6, 7

Latta Truck Lines, Inc., v. Hargus et al., 29 F. Supp. 53 10

South Carolina State Highway Department v. Barnwell Bros., Inc., et al., 303 U. S. 177, 82 L. Ed. 734 .. 9

United States of America v. LaTuff Transfer Service, Inc., et al., 95 F. Supp. 375 ..... 7, 8

Statutes Cited.

Arkansas Motor Carrier Act:
Section 5 (a) (8) 2
Section 5 (b) 4
Acts of Arkansas, 1941, Act 367 4

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1952.

No. 37.

LLOYD A. FRY ROOFING COMPANY,
Petitioner,

vs.

SCOTT WOOD et al., Individually and as Members of and Composing the ARKANSAS PUBLIC SERVICE COMMISSION,
Respondents.

REBUTTAL BRIEF

Filed on Behalf of Petitioner.

Until shortly before this case was called for presentation of oral argument on November 10, 1952, neither petitioner nor its counsel had been advised that a reply brief had been filed on behalf of respondents. As of this date neither petitioner nor its counsel have been served with copy of such brief, but counsel for petitioner procured a copy thereof from the office of the clerk, and, in the course of oral argument, the court graciously granted our request for time within which to respond thereto.

We pray the indulgence of the court in being permitted to submit a requisite number of mimeographed copies of rebuttal brief on behalf of petitioner, copies thereof having been served upon counsel for respondents, and a copy forwarded to the printer with directions that forty printed copies be promptly forwarded to the clerk of this court.

In response to the reply brief filed on behalf of respondents, it is to be noted that the sole theme and basis thereof is the same as that adopted by the majority opinion of the court below, i. e., that petitioner is engaging in some sort of a "subterfuge" with the purpose of avoiding compliance with some state statute which respondents might lawfully enforce.

As we analyze the decision of the court below and the reply brief filed on behalf of respondents, it appears that the fundamental bases thereof are that (1) the definition of "contract carrier" contained in Section 5 (a) (8) of the Arkansas Motor Carrier Act is or was intended to be "all inclusive"; (2) that petitioner is seeking to enjoy the benefits of some privilege which the Arkansas Public Service Commission might grant, and (3) that petitioner is seeking to avoid some supervision which the Arkansas Public Service Commission might lawfully exercise. It is petitioner's position that all three premises are erroneous.

Let us say at this point, however, that if petitioner is to be damned at the portals by the unsupported conclusion of the majority opinion below that its system of selling and distributing its merchandise is a "subterfuge," unlawfully designed to avoid regulation by the authorities of the State of Arkansas, without this court inquiring into the evidence of record supporting or failing to support such conclusion, and without this court, as did the court below, refusing to determine whether petitioner was, in truth and in fact, a bona fide private carrier within the meaning of Part II of the Interstate Commerce Act, and

without this court determining whether the primary business of petitioner was the sale and distribution of its products in interstate commerce rather than the performance of a transportation service, and without this court determining whether petitioner did in reality exercise exclusive direction and control over leased motor vehicle equipment and the drivers thereof, and without this court determining whether a bona fide employer-employee relationship existed between petitioner and his truck drivers, irrespective of whether they did or did not own tractors which were incorporated into the fleet of motor vehicle equipment leased and operated by petitioner, decision of all of which fundamental issues was pretermitted by the court below, then, in that event, our time and that of the court is being wasted and the substance of our client expended unnecessarily.

If, on the other hand, we are not to be precluded from having fundamental issues considered by this court simply because the draftsman of the opinion below, without support in the record, and in the face of dissenting opinions by his brethren, sought, ineffectually we are confident, to preclude review of the erroneous opinion below by the well-known device of characterizing petitioner's operation as a "subterfuge," then there is merit in our cause and the fundamental issues deserve consideration by this court.

The confusion in the court below, as well as of respondents and their counsel, is amply demonstrated by the statement made at page 6 in the "Brief Filed on Behalf of Respondents," where it is stated:

> "The position of respondents in this matter is simply that they consider the arrangement devised by petitioners to be a device, ingenious though it may be, created for the sole purpose of allowing petitioner to gain the advantage of **private carriage** (sic) of commodities without assuming the burdens and hazards of that type of carriage. . . ." (Emphasis supplied.)

It is and always has been the position of petitioner that **it is a private carrier**; further, that Act 367 of the Acts of Arkansas, 1941, popularly known as the Arkansas Motor Carrier Act, by Section 5 (b) thereof provides that **"Nothing in this act shall be construed to include . . . (3) any private carrier of property"** (Appendix C to petitioner's brief, page 50). (Emphasis supplied.)

At the sake of repetition, and in response to the broad and general statements contained in the brief filed on behalf of respondents, wherein no record reference is made to support same, we reiterate our position that if petitioner is a private carrier within the meaning of the Interstate Commerce Act then its truck driver employees cannot, at one and the same time, in the performance of the same transportation, be contract carriers within the meaning of the Arkansas Motor Carrier Act; and we say, as well, that if a bona fide employer-employee relationship exists between petitioner and its truck drivers that in the performance of the same transportation they cannot be contract carriers within the meaning of the Arkansas Motor Carrier Act and, as well, the employees of petitioner; we say, further, without fear of any contradiction in the record, that the existence of a bona fide employer-employee relationship between petitioner and its truck drivers is, in the vernacular, established to be as "clean as a hound's tooth" and we challenge all comers to point out any finding of the court below to the contrary. We challenge all comers, as well, to point out any finding by the court below contrary to our assertion that petitioner exercised exclusive direction and control over motor vehicle equipment leased to it, regardless of by whom owned, over the drivers thereof, and that petitioner solely and alone directed when, where and by whom such equipment was to be operated, the cargo to be transported thereon, and all conditions surrounding the operation of such equipment and its utilization by petitioner as a private carrier

in the transportation of its merchandise. We challenge all comers, as well, to point out any finding by the court below or any evidence of record even remotely indicating any fact contradicting our assurance to this court that the record, without contradiction, establishes conclusively that petitioner assumed full responsibility to the public and all regulatory authorities for the operation of equipment leased to it and utilized by it in the distribution of its merchandise.

We respectfully present to the court that the brief filed on behalf of respondents, as was the opinion of the majority below, is predicated on district court decisions which are neither in point on the facts nor legal principles involved in the case at bar and which, insofar as applicable, support the contentions of the petitioner in this cause. In this connection it is significant, however, that even astute counsel for respondents in their brief filed in this court recognize that a number of the cases referred to by the court below have no applicability, and that they have not relied thereon in the brief filed with this court.

Let us first allude to the opinion in **Interstate Commerce Commission v. F. & F. Truck Leasing Company**, 78 F. Supp. 13, upon which great reliance is placed by respondents and the majority opinion below. It is to be noted, in contradistinction to the undisputed facts of record in this case, that the leases there involved were for single trips; lessor provided the drivers and lessee did not select or designate the drivers of the particular equipment supplied to them; frequently, at the end of the outbound haul, lessor would lease the equipment to another shipper and direct the driver in performance of the transportation; frequently equipment rental charges were based on rates and cents per 100 pounds of property hauled; drivers' wages were deducted by lessee from the agreed equipment rental; lessor carried cargo insurance on the property transported; bills of lading were frequently issued by

lessor to lessee for cargo transported; lessor directed the drivers when and where to report for duty; drivers' logs were delivered to lessor; provisions of the written leases relating to the selection of drivers and exclusive control of the operation were not observed by lessee.

We shall not burden the court with a repetition of the summary of the evidence contained in our brief wherein it was pointed out, in detail, that the actual operation under the equipment leases involved in this litigation was in scrupulous compliance with the terms and provisions of such leases (which fact was not alluded to by the majority opinion of the court below), and wherein, as well, it was pointed out that **not one** of the objectionable features found by the court to exist in the arrangement under consideration in **Interstate Commerce Commission v. F. & F. Truck Leasing Company**, 78 F. Supp. 13, was present in the case at bar.

As we pointed out in our original brief, the action of respondents herein was predicated on the conclusion that petitioner's operations violated a "Conference Ruling and Order" promulgated by the Arkansas Public Service Commission in Case No. R-461 (R. 199 et seq.), which Conference Ruling and Order tracks, in all respects, the decision of the District Court in **Interstate Commerce Commission v. F. & F. Truck Leasing Company**, 78 F. Supp. 13. Further, as we pointed out in our initial brief, all evidence of record definitely established that **not one single feature** found objectionable by either the Arkansas Public Service Commission or the United States District Court in the case of **Interstate Commerce Commission v. F. & F. Truck Leasing Company**, 78 F. Supp. 13, exists in the case at bar. See, for example, the testimony of the witness Whitington, introduced by respondents, appearing at pages 38 et seq. of the record, and the testimony of the witness Hecht, introduced by petitioner, appearing at pages 87 et seq. of the record.

Each of these witnesses was asked specifically with respect to every element considered by the court in the **F. & F.** case and the Arkansas Public Service Commission to be determinative of whether contract or private carriage was being performed, and, without contradiction, each of the witnesses for both petitioner and the respondents, establish that all elements considered essential to the performance of private carriage as distinguished from contract carriage existed in this case.

Obviously, the factual situation with which the court was confronted in the **F. & F. Truck Leasing Company**, supra, is distinguishable from that in the case at bar, but the attention of this court is directed to the significance attached by the court in the **F. & F.** case to the failure of lessee to conform to the terms and provisions of the written lease and to exercise direction and control over the drivers and equipment and to assume responsibility for operation thereof on the highways. This distinction was entirely overlooked by the majority opinion of the court below.

The next case strongly relied on by respondents and by the court below is that of **United States of America v. LaTuff Transfer Service, Inc., et al.**, 95 F. Supp. 375, wherein we again say the factual situation varies greatly from that obtaining in the case before this court as is amply demonstrated by the preliminary remarks of the court in such case, as follows:

> "It was agreed that the primary issue to be determined in this case is whether the operator of a truck rental business may lawfully, without a certificate or permit from the Interstate Commerce Commission, furnishes motor vehicles for compensation to a shipper for a one-way outbound haul for delivery of the shipper's property moving in interstate commerce, where the driver is an employee of the owner-operator and is

jointly selected by the operator and the shipper to serve as an employee of the shipper in driving the vehicle to the end of the outbound trip. Upon reaching the destination of the outbound trip the driver takes over the vehicle and serves as agent of, and driver for, the owner-operator for further leasing of the equipment by the operator to an authorized motor carrier in transporting general commodities in interstate commerce for compensation, as well as transporting unprocessed agricultural commodities for shippers on the return to the original point."

The court, in the **LaTuff Transfer Service Case**, supra, attaches great significance to the fact that the driver was not a bona fide employee of the shipper; that the lessor assumes responsibility for safe transportation of the cargo, and that lessee exercised no control over the equipment or the drivers on the inbound haul and assumed no responsibility for the return movement of the equipment, either financially or otherwise. No such factual situation is presented in the case at bar, or was found to exist by the opinion of the majority of the court below.

Further, in **Georgia Truck System, Inc., v. Interstate Commerce Commission**, 123 F. (2d) 210, relied upon by respondents in brief and by the majority opinion of the court below, the court had under consideration an operation which was set up for the specific purpose of performing transportation, a portion of which had previously been performed under a contract carrier permit; there the court found as a fact that the actual operation did not conform to the terms of equipment leases involved. Further, the lessor selected and furnished the drivers and paid their wages and lessee exercised no control whatsoever over the drivers. In addition, the lessor of the equipment assumed responsibility for cargo transported and carried insurance thereon. Evidence of subterfuge existed in kick-backs of

drivers' wages and social security taxes allegedly paid by lessee.

We respectfully present that the factual situation involved in such case is far removed from that existing in the case at bar.

The attention of the court is challenged, however, to the indication in all of the above cases that had actual operations been in compliance with the terms and provisions of the equipment leases the operations would have been held to be bona fide private carriage. In the case at bar the opinion below does not find that in actual operation the provisions of the equipment leases were not scrupulously complied with in any respect.

Petitioner has no quarrel with the principle that, within permissible limits, states may impose regulations on interstate commerce where such do not unduly burden, hinder, or destroy such commerce, but the cases cited by respondents in brief are not in point in this proceeding. It must be remembered that the transportation here involved is private carriage within the meaning of the Interstate Commerce Act, and that the Arkansas Motor Carrier Act specifically provides that the provisions thereof **shall not apply to private carriage.** To refer to the cited cases, in **Columbia Terminals Company v. Lambert et al.**, 309 U. S. 620, 84 L. Ed. 983, plaintiff admittedly was a contract carrier; **South Carolina State Highway Department v. Barnwell Bros., Inc., et al.**, 303 U. S. 177, 82 L. Ed. 734, established simply the right of states to enact height and weight limitations for vehicles engaged in using the highways of the state where no such limitations have been prescribed by Congress; and in **Frank Eicholz v. Public Service Commission of the State of Missouri**, 306 U. S. 268, 83 L. Ed. 641, the court simply held that the state had a right to revoke an interstate common carrier's certificate granted by it to the carrier by virtue of the fact that the carrier had vio-

lated an intrastate permit, the carrier having applied for but not yet obtained an interstate common carrier's certificate of convenience and necessity from the Interstate Commerce Commission. Thus, it is plain that neither of the foregoing decisions have any application to the issues and principles involved in the case at bar.

The decision in **Bradley v. Public Utilities Commission,** 289 U. S. 92, 77 L. Ed. 1053, was handed down on April 10, 1933, prior to enactment of Part II of the Interstate Commerce Act. In such case, the sole question before the court was the validity of an order of a state regulatory body denying an application for a common carrier permit upon the grounds that safety on the highways and of the public would be imperiled by the proposed operation, i. e., the question being the lawful exercise by the state of its police power. The decision is predicated solely and alone upon the principle, with which we have no quarrel, that in the exercise of its police power the state may promulgate and enforce reasonable regulations to insure safety on its highways. This question is not involved in the litigation at bar.

And finally, to dispose of all cases cited by respondents in brief, in **Latta Truck Lines, Inc., v. Hargus et al.,** 29 F. Supp. 53, plaintiff admittedly was a contract carrier, having applications to operate as such pending before both the Interstate Commerce Commission and the state regulatory body. The sole question before the court was whether a temporary injunction staying action of the state body would be granted pending final action of the Interstate Commerce Commission.

The opinion does not dispose of the controversy nor of any essential element thereof on the merits, and no issue present in the case at bar was presented in such case; the opinion in this case was handed down by the district court on June 15, 1937, and it is significant that it has not been cited by any court since it was rendered.

By the foregoing we have endeavored, and, effectually we believe, to point out wherein the opinion of the majority below as well as of the brief filed by respondents in an effort to support such opinion, is predicated upon conclusions having no factual basis in the record and the citation of portions, removed from context, of opinions of lower federal courts and of this court, wherein neither the factual situations comparable to those in the case at bar nor the legal principles at issue were involved.

Proper determination of the issues in the case at bar resolves itself, we respectfully submit, into the following propositions: (1) Is mere ownership of motor vehicle equipment to be determinative of the question of whether, under Part II of the Interstate Commerce Act, private or contract carriage is being performed, without consideration of the primary business of the shipper, without consideration of the extent to which direction and control is exercised over the equipment and the driver thereof, and without consideration as to whether or not a bona fide employer-employee relationship exists between the truck driver and the shipper transporting its own merchandise in interstate commerce? If the answer is in the affirmative, then the decree of the court below should be sustained. If, on the other hand, the foregoing elements are of any importance and deserving of any consideration in determining whether in the transportation of goods in interstate commerce contract or private carriage is being performed then the answer necessarily must be in the negative and the judgment of the court below reversed.

(2) If it is to be held that a bona fide private carrier of property cannot transport its goods in interstate commerce by the utilization of leased equipment and the employment of a driver therefor as a bona fide employee irrespective of whether he does or does not own the leased equipment then, in that event, the judgment of the court below should be affirmed; on the other hand, if a private

carrier may transport its property by the use of leased motor vehicle equipment, and enter into bona fide employer-employee relations with any person to drive such equipment, regardless of the ownership thereof, then, in that event the judgment of the court below must be reversed.

(3) If the law of the land is to be that the mere ownership of equipment, rather than direction and control over such equipment as well as the driver thereof and the responsibility of the shipper to the public at large is to be determinative of the question of whether private or contract carriage is being performed, within the meaning of the Interstate Commerce Act, then the judgment of the court below should be affirmed; if, on the other hand, the "primary business" test and the "direction and control" test and the test whether or not in actual operation the provisions of written equipment leases are complied with are entitled to any consideration then, in that event, the judgment of the court below should be reversed.

(4) If it is to be held to be the law of the land that a shipper, whose status as a private carrier is unquestioned, may have a truck driver employee employed in a bona fide employee status, which status is also unquestioned, and that in the performance of the same transportation the shipper shall be held to be a private carrier within the meaning of the Interstate Commerce Act and the truck driver employee a contract carrier within the meaning of the Arkansas Motor Carrier Act, then, in that event, the judgment of the court below should be affirmed; if this anomalous situation cannot be countenanced, then the judgment of the court below should be reversed.

(5) If it is to be held that a truck driver, employed by petitioner, transporting petitioner's merchandise under exactly the same terms and conditions of employment, under the same supervision and regulation, who today is oper-

ating a tractor not owned by him is a bona fide employee of petitioner as a private carrier, but who, tomorrow, happens to operate a tractor owned by him incorporated in a fleet of equipment leased to petitioner, thereby automatically becomes a contract carrier within the meaning of the Arkansas Motor Act, although he has no discretion as to the equipment which will be operated by him, the kind, character or quantity of merchandise to be transported thereon, the destination thereof, the route over which he will operate, the time of performance of the transportation, and whose compensation is based solely and alone upon the number of miles driven as distinguished from cargo handled, then, in that event, this court should say that the judgment below should be affirmed, and that today this truck driver is a contract carrier and tomorrow this truck driver is an employee of petitioner herein. If, on the other hand, our conception of the law is correct and if we have correctly represented the facts of record to the court, then, in that event, the judgment of the court below perforce must be reversed.

Respectfully submitted,

JAMES W. WRAPE,
GLENN M. ELLIOTT,
1804 Sterick Building,
Memphis, Tennessee,
Attorneys for Petitioner.